

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DILLING MECHANICAL
CONTRACTORS, INC.

and

Case Nos. 25-CA-25094
25-CA-25485

INDIANA STATE PIPE TRADES
ASSOCIATION, UNITED
ASSOCIATION OF PLUMBERS
AND PIPEFITTERS, AFL-CIO, AND
PLUMBERS AND STEAMFITTERS
LOCAL UNION NO. 166, UNITED
ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE
PLUMBING AND PIPEFITTING
INDUSTRY OF THE UNITED STATES
AND CANADA

Michael T. Beck, Esq.,
Indianapolis, Indiana,
for the General Counsel.

Ronald J. Hein, Jr., and
Jeremy C. Moritz, Esq.
(Franczek Sullivan P.C.)
Chicago, Illinois,
for the Respondent.

William R. Groth, Esq.
(Fillenwarth, Dennerline, Groth &
Towe), Indianapolis, Indiana,
for the Charging Party.

SUPPLEMENTAL DECISION

Statement of the Case

PAUL BOGAS, Administrative Law Judge. This case is before me on remand from the Board. On May 12, 2000, I issued my decision finding that Dilling Mechanical Contractors, Inc. (the Respondent) had violated Section 8(a)(1) of the National Labor Relations Act (the NLRA) by filing, maintaining, and prosecuting a meritless and retaliatory state court lawsuit against union organizer Paul Long, and the Indiana State Pipe Trades Association, United Association of Plumbers and Pipefitters, AFL-CIO, and Plumbers and Steamfitters Local Union No. 166, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the Union), and by propounding discovery in the lawsuit that sought the names of employees who had joined the Union. Long had removed a number of trash bags from the Respondent's dumpster in hopes of finding information that

would help him contact the Respondent's employees. In its lawsuit, filed in Indiana state court, the Respondent alleged that the removal of this trash constituted "criminal acts," including racketeering, trespass, burglary and receipt of stolen property. The Respondent did not seek injunctive relief or attempt a voluntary resolution, but rather prayed for compensatory, punitive, and treble damages, which it told Long would come to \$3 million. The Indiana Court of Appeals rejected all of the Respondent's legal theories, stating that when "trash bags are placed in an unlocked dumpster on the curtilage and readily accessible to others, that trash has been abandoned." I concluded that the Respondent's unsuccessful state court lawsuit had an unlawful purpose based, inter alia, on the fact that the Respondent had already been found to have initiated an unlawful anti-union campaign that included terminations, constructive discharges, physical intimidation, verbal abuse, strict surveillance and other acts designed to interfere with union and protected concerted activity. See *Dilling Mechanical Contractors*, 318 NLRB 1140 (1995), enf'd. 107 F.3d 521 (7th Cir. 1997), cert. denied, 522 U.S. 862 (1997). Moreover, the Respondent had never raised the issue of trespass except in response to the efforts of union organizers, and did not lock the dumpster, place the dumpster in an area where it was not readily accessible to others, guard the dumpster, shred sensitive documents placed in the dumpster, or otherwise take steps to protect the trash from removal. I also found that the manner in which the Respondent conducted the litigation showed that it was "not . . . legitimately concerned with the taking of trash, but rather . . . [sought] to exploit a perceived misstep by a union official to hobble an organizing effort." The record showed that the Respondent's lawsuit "was designed to punish, and to the extent possible, intimidate and debilitate Long and the Union, not to address the supposed trespass or theft."

The Respondent filed exceptions to my decision. While the matter was pending before the Board, the Supreme Court issued its decision in *BE & K Construction Company v. NLRB*, 122 S.Ct. 2390 (2002), which invalidated the Board standard under which "all reasonably based but unsuccessful suits filed [by an employer against a union] with a retaliatory purpose" may be found unlawful. On September 26, 2002, the Board remanded this matter to me "for further consideration in light of *BE & K Construction*, including, if necessary, reopening the record to obtain further evidence." All parties informed me that they did not believe further evidentiary proceedings were necessary, and I agreed. The General Counsel, the Respondent, and the Charging Party Union filed supplemental briefs on the subject presented by the remand order. After reviewing the Board's remand order, the briefs of the parties, and the record as a whole, I have determined that application of the Supreme Court's decision in *BE & K Construction*, does not affect my finding that the Respondent's state court lawsuit violated the NLRA.

Discussion

1. The *BE & K Construction* case

In *BE & K Construction*, the Board found that the employer had violated Section 8(a)(1) of the NLRA by filing a meritless federal lawsuit against various unions in retaliation for protected activity. 329 NLRB 717 (1999). The lawsuit filed by BE & K lacked merit, the Board concluded, because all the claims were either decided against the plaintiffs or were voluntarily dismissed with prejudice by them. Id. at 722-23. The Board stated that the lawsuit had been retaliatory because it was "directed at protected conduct," and "necessarily tended to discourage similar protected activity." Id. at 726. The Board also found evidence of retaliatory motive in the fact that the plaintiffs had named certain unions as defendants in the federal lawsuit who were not involved in the complained of activities. Id. at 727. According to the Board, it was also proper to take into account the fact that the suit was unmeritorious in determining whether it was filed for retaliatory reasons. Id. at 721. The Board stated that under the Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983),

"even if an employer had a 'reasonable basis' for bringing the suit, the suit may still be found unlawful if the employer withdraws the suit or loses on the merits and the Board finds that it brought the suit out of a desire to retaliate against protected activity." 329 NLRB at 721. The Board stated that it "may not enjoin the prosecution of a pending state court suit alleged to have been filed with a retaliatory motive unless the suit lacks a reasonable basis in fact and law," but that "suits that have been litigated to completion" are "[o]n an entirely different footing" because "the plaintiff has had his day in court and the state's interest in providing a forum for its citizens has been vindicated." *Ibid.*

The United States Court of Appeals for the Sixth Circuit affirmed the Board's decision, 246 F.3d 619 (6th Cir. 2001), but the Supreme Court granted certiorari and reversed. The Supreme Court noted that the First Amendment protects the "right of the people . . . to petition the Government for redress of grievances," and that this right has been interpreted to apply to the use of courts to advocate causes. 122 S. Ct. at 2396. The Court stated, however, that the protection of the First Amendment did not "extend to 'illegal and reprehensible practice[s] which may corrupt the . . . judicial proces[s]'" *Ibid.* (citation omitted). The Court stated that the decision in *Bill Johnson's* left open the question of "whether the Board may declare that an unsuccessful retaliatory lawsuit violates the NLRA even if *reasonably* based." *Id.* at 2397-98 (emphasis added). If so, the Court stated, it would mean that the Board could impose burdens -- including a fee award, reputational harm, and the legal consequences of a declaration of illegality -- on reasonably based, but unsuccessful, petitioning. *Id.* at 2398.

The Court considered the fact that the Board confines its penalties to unsuccessful suits brought *with a retaliatory motive*, but concluded that this limitation, at least as it had been applied by the Board, did not alleviate the First Amendment concerns. The Court stated that the Board defined a retaliatory suit as one brought with a motive to interfere with the exercise of Section 7 rights. *Id.* at 2400. The Court concluded that given that definition, the retaliatory motive requirement "fails to exclude a substantial amount of petitioning that is objectively and subjectively genuine." *Id.* at 2401. In the case before it, the Court said, there was evidence of antiunion animus, but such animus does not mean that petitioning is not genuine "[a]s long as a plaintiff's *purpose* is to stop conduct he reasonably believes is illegal." *Id.* 2401 (emphasis in original).

The "final question" identified by the Court was "whether, in light of the important goals of the NLRA, the Board may nevertheless burden an unsuccessful but reasonably based suit when it concludes that the suit was brought with a retaliatory purpose." *Id.* at 2401. The Court declined to answer that "difficult constitutional question." Instead, the Court indicated that to the extent the Board's standard interpreting Section 8(a)(1) of the NLRA raised the question, it was not an interpretation that was not compelled by the statute. Rather than decide the difficult question, the Court chose to invalidate the Board interpretation that raised it. *Id.* at 2401-02. The Court did not define a new standard,¹ and explicitly left open the possibility that a

¹ The Court stated that it had previously held that for a suit to violate antitrust law the suit must be a "sham," meaning that it must be objectively baseless such that no reasonable litigant could realistically expect success on the merits, and that the litigant's subjective motivation must conceal an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process as an anticompetitive weapon. *Id.* at 2396 (discussing *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993)). The Court did not state that this standard was applicable to cases that, like the one before it, allege that a suit violates the NLRA, but did note that the latter type of case "raises the same underlying issue of when litigation may be found to violate federal law." 122 S.Ct. at

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reasonably based, but unsuccessful, lawsuit could violate the NLRA if the suit "would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA protected activity." The Court reversed the decision of the Sixth Circuit and remanded the matter for further proceedings consistent with its opinion. The Sixth Circuit then remanded the matter to the Board, which has yet to rule.

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Two concurring opinions were filed, which offer differing interpretations of the majority opinion. Justice Scalia, in a concurring opinion joined by Justice Thomas, stated that while the Court had avoided defining a new standard to replace the Board standard being invalidated, "the implication of our decision today is that . . . we will construe the [NLRA] in the same way we have already construed the Sherman [Antitrust] Act to prohibit only lawsuits that are *both* objectively *and* subjectively intended to abuse process." Justice Scalia stated that he disagreed with the view that the "differences between the NLRA and the Sherman [Antitrust] Act . . . suggest . . . that a complainant enjoys greater First Amendment rights to file a lawsuit in the face of the latter than the former." Justice Scalia argued that the more significant difference was that in the antitrust context "the entity making the factual determination whether the objectively reasonable suit was brought with an unlawful motive would have been an Article III court," whereas in the NLRA context an executive agency was being given the power to punish a reasonably based suit filed in an Article III court. 122 S. Ct. 2402-03. Therefore, he suggested, the standard for finding that a retaliatory antiunion lawsuit violates the NLRA should be at least as stringent as that for finding that an anticompetitive lawsuit violates the Sherman Act.

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Justice Breyer filed an opinion concurring in part, and concurring in the judgment, in which Justice Stevens, Justice Souter, and Justice Ginsburg joined. Justice Breyer read the Court's opinion to mean only that the Board could not declare an employer's lawsuit to be a violation of the NLRA "*in the circumstances present here*, which is to say, in the kind of case in which the Board rests its finding of 'retaliatory motive' almost exclusively upon the simple fact that the employer filed a reasonably based but unsuccessful lawsuit and the employer did not like the union." 122 S.Ct. at 2403 (emphasis in original). The Court left open the possibility, Justice Breyer said, that a violation could be established where "the evidence of 'retaliation' or antiunion motive might be stronger or different, showing, for example, an employer, indifferent to outcome, who intends the reasonably based but unsuccessful lawsuit simply to impose litigation costs on the union," or showing that the lawsuit was brought "as part of a broader course of conduct aimed at harming the unions and interfering with employees' exercise of their rights under [the NLRA]." Ibid. Justice Breyer rejected the view that the implication of the Court's decision was that the standard for determining whether a lawsuit violates antitrust law should be applied to determine the legality of a lawsuit alleged to violate the NLRA. He stated that "antitrust and labor law differ significantly in respect to their consequences, administration, scope, history, and purposes." Id. at 2404. In particular, he observed that the threat of antitrust litigation is more likely than NLRA litigation to discourage legitimate lawsuits because: the remedies under antitrust law are more burdensome than those that would be available under the NLRA; antitrust litigation typically involves far higher court costs than NLRA litigation; and,

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2396. The Court noted that the Board had identified differences between antitrust litigation and litigation under the NLRA -- in particular, that NLRA litigation cannot be launched solely by private action but only when the Board's general counsel issues a complaint, that the Board has no authority to order punitive remedies, and that prehearing discovery is limited in Board proceedings. The Court stated, however, that those factors "[a]t most . . . demonstrate that the threat of an antitrust suit may pose a *greater* burden on petitioning than the threat of an NLRA adjudication," and "do[] not mean the burdens posed by the NLRA raise no First Amendment concerns." Id. at 2398 (emphasis in original).

NLRA litigation cannot be launched solely by private action but only when the Board's general counsel issues a complaint. Justice Breyer also pointed out that suppression of antiunion lawsuits is far more central to the purposes of the NLRA, than the suppression of anti-competitively motivated lawsuits is to antitrust law. *Id.* at 2405-06.

5 I adopt the interpretation of the *BE & K* majority opinion suggested by Justice Breyer. In *BE & K*, the Supreme Court invalidated the Board's standard for finding unsuccessful, but reasonably based, retaliatory state lawsuits unlawful, but declined to articulate a new standard to guide consideration of future cases. The implication of what the Court does say is susceptible to more than one reasonable construction, as demonstrated by the reasonable, but
10 contrary, constructions given it by Justice Scalia (joined by Justice Thomas) and Justice Breyer (joined by Justice Stevens, Justice Souter, and Justice Ginsburg), neither of which construction is explicitly embraced or rejected by a majority of the Court. For its part, the Board has yet to articulate a new standard in light of the Supreme Court's ruling. It is well established that administrative law judges are bound to follow Board precedent unless and until reversed by the Board or the Supreme Court. *Butterworth Mortuary*, 270 NLRB 1014, 1020 (1984); *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616-617 (1963). In the circumstances of the instant case, I believe this rule warrants my choosing, from among reasonable interpretations of a Supreme Court decision, that interpretation which leaves intact a greater measure of the Board's precedent. See *International Longshoremen's Association, Local 799*, 257 NLRB 1075 (1981)
20 (Board rejects administrative law judge's interpretation of Supreme Court decisions that was unnecessarily expansive, and adopts narrower interpretation that is more consistent with Board precedent) *enfd. mem.* 702 F.2d 1205 (D.C. Cir. 1983). Here, the view expressed by Justice Breyer is more in keeping with Board precedent since it only invalidates the Board's standard for what constitutes a sufficient retaliatory motive to warrant finding a violation, whereas Justice
25 Scalia's view would invalidate both the Board's standard for what is sufficiently retaliatory and also its standard for what is sufficiently lacking in merit.

Justice Breyer's view is also, I think, the better one. First, it preserves one of the most attractive attributes of the Board's standard. Under the Board's standard, the decision about
30 whether the concluded state court lawsuit lacked merit is based entirely on the determination reached in the state court regarding that lawsuit. Thus the Board is not forced to immerse itself in state law in order to determine whether a lawsuit was objectively baseless. Justice Scalia's view would necessarily draw the Board into that unfamiliar territory in order to make its own determination about whether an unsuccessful state court lawsuit was objectively baseless under
35 state law. Second, I agree with Justice Breyer's views about the differences between NLRA litigation and antitrust litigation, and, in particular, am persuaded that the lower litigation costs, milder remedies, and agency screening process in the NLRA context mean that the threat of NLRA litigation imposes substantially less of a burden on genuine petitioning than does the threat of antitrust litigation attacking lawsuits filed for anti-competitive purposes.

40 I am troubled by Justice Scalia's view that a violation of the NLRA could not be shown unless the retaliatory lawsuit was baseless both objectively and subjectively since that standard would appear to protect all retaliatory lawsuits for which a reasonable basis in fact and law could be articulated, even if the employer was not motivated by the complained of conduct, but solely
45 by a desire to use the judicial process to retaliate against a union for engaging in protected activities. That would be contrary to the view stated in the majority opinion that a lawsuit is "genuine petitioning" when its purpose is "to stop conduct [the plaintiff] reasonably believes is illegal." 122 S.Ct. at 2401.

50 Justice Scalia states that the differences between antitrust law and labor law that are discussed by Justice Breyer are all outweighed because in the NLRA context the Board (an

agency headed by an entity composed of members appointed by the President with the advice and consent of the Senate, 29 U.S.C. Section 153 (a)) is the entity making the factual determination whereas in Sherman Act litigation the factual determination is made by an Article III court. Justice Scalia does not, however, explain why he believes the threat of fact-finding by an entity such as the Board represents so much greater a burden on petitioning than does the threat of fact-finding by an Article III court, and it is not self-evident to me. Rather, as I indicate above, I agree with Justice Breyer that the lower litigation costs, more limited remedies, and agency screening, in the case of litigation before the Board mean that the threat of such litigation is less of a burden. To the extent that Justice Scalia does explain his concern with the Board's factual determinations he observes that executive agencies do not share the independence of Article III courts and he questions "whether an *executive agency* can be given the power to punish a reasonably based suit filed in an Article III court." 122 S.Ct. at 2403 (emphasis in original). As stated, Justice Scalia's concern is addressed to suits that, like *BE & K's*, are filed in an Article III court, and would not necessarily be raised by a lawsuit that, like *Dilling Mechanical's*, was filed in state court, and might be viewed differently under the Supremacy Clause in Article VI of the Constitution and considerations of federalism. At any rate, it is worth noting that the factual determinations in NLRA cases alleging violations of Section 8(a)(1) are in the main made by federal administrative law judges who are guaranteed a substantial level of independence and conduct a wide range of due process adjudications, often involving remedies significantly more onerous than any likely to be imposed for retaliatory lawsuits found unlawful under the NLRA. The Supreme Court itself has recognized this independence, stating that "the process of agency adjudication is currently structured so as to assure that the [administrative law judge] exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency" and "insulated from political influence." *Fed. Maritime Com'n v. S.C. State Ports Auth.*, 535 U.S. 743, ___, 122 S. Ct. 1864, 1872-73 (2002), quoting *Butz v. Economou*, 438 U.S. 478, 513 (1978).

For the reasons discussed above, I interpret the Supreme Court's decision in *BE & K* as invalidating the Board's standard only to the extent suggested by Justice Breyer – i.e., to the extent that the standard permitted a violation of the NLRA to be found based on a "retaliatory motive" that rests "almost exclusively upon the simple fact that the employer filed a reasonably based but unsuccessful lawsuit and the employer did not like the union." 122 S. Ct. at 2403 (concurring opinion of Justice Breyer).² A violation may still be found where the lawsuit is unsuccessful and the evidence of retaliation is stronger; for example, where the employer's

² In its supplemental brief, the General Counsel takes a different view of the *BE & K* decision, stating that that the Supreme Court indicated that in determining whether a retaliatory lawsuit violates the NLRA, "the Board could no longer rely on the fact that the lawsuit was ultimately meritless, but must determine whether the lawsuit, regardless of its outcome on the merits, was reasonably based." General Counsel's Brief at 6. The General Counsel states the record did not show that the suit was without a reasonable basis, and therefore asks that I find that the Respondent did not violate the NLRA. *Id.* at 7-8. The General Counsel also opines that "[t]he evidence reveals that Respondent was motivated, at least in part, by a desire to protect its legitimate privacy rights." *Id.* at 8. The General Counsel does not identify what credible evidence "reveals" this legitimate motivation and I reject the General Counsel's assessment. For the reasons discussed in my original decision, including my assessment of the demeanor and testimony of the witnesses, and in particular that of Richard Dilling, I conclude that a desire to stop the conduct that was the putative target of the state court lawsuit played no significant part in Respondent's filing and maintenance of that lawsuit, which, instead, was motivated by a desire "to punish, and to the extent possible, intimidate and debilitate Long and the Union."

purpose is not "to stop conduct he reasonably believes is illegal," *Id.* at 2401, but rather to misuse the judicial process itself to punish a union for protected activities, or where the employer's lawsuit is "part of a broader course of conduct aimed at harming the unions and interfering with employees' exercise of their rights under Section 7(a) of the NLRA," *Id.* at 2403 (concurring opinion of Justice Breyer).

2. Dilling Mechanical's State Court Lawsuit

Considering the instant case in light of *BE & K*, I conclude that the record still warrants finding that the Respondent's unsuccessful state court lawsuit violated Section 8(a)(1). The evidence of retaliation and antiunion motive in this case is both "stronger and different" than that present in *BE & K*. As discussed in my original decision, the record here did not merely show that the Respondent filed an unsuccessful lawsuit and did not like the union. Rather it showed that the purpose of the Respondent's state court lawsuit was "to punish, and to the extent possible, intimidate and debilitate Long and the Union, not to address the supposed trespass and theft." Given this purpose, the Respondent's lawsuit did not fall within the bounds of what the Supreme Court called "genuine petitioning" designed "to stop conduct [it] reasonably believe[d] [wa]s illegal," but rather was an attempt to misuse the state court as a weapon for punishing, harming, and interfering with Long's and the Union's organizing efforts. Nothing in the briefs of the parties leads me to reconsider the factual findings that establish a violation of Section 8(a)(1) under *BE & K*. As is discussed fully in my original decision,³ my factual finding regarding the Respondent's motivation is supported by: the suspicious timing of the state court lawsuit;⁴ the failure of the Respondent to seek a voluntary resolution or injunctive relief; the nature of the allegations in the unsuccessful state court action; the Respondent's request for compensatory, punitive, and treble damages to remedy the removal of trash; the fact that the Respondent had only ever raised the trespass issue in response to union organizing; the failure of the Respondent to take steps to protect its trash from others; the unlawful attempt by the Respondent to use the state court lawsuit to discover the names of union supporters on its workforce; the Respondent's recent history of repeated unlawful anti-union practices; the intimidating statements that the Respondent's agents made about the lawsuit to union officials and employees; and the other evidence and testimony.

The record also leads me to conclude that the state court lawsuit was, to use Justice Breyer's words, "part of a broader course of conduct aimed at harming the unions and interfering with employees' exercise of their rights under Section 7(a) of the NLRA." The Respondent filed its state court lawsuit only two months after the Board issued a decision finding that the Respondent had committed 20 unfair labor practices, including a number of hallmark violations, against two unions. That decision found that the Respondent's unlawful acts during the period from December 1992 to August 1994 included: terminating, constructively discharging, and disciplining employees who engaged in union or protected concerted activity; unlawfully refusing to permit former strikers to return to work after those individuals made an unconditional offer to return to work; physically intimidating, verbally abusing, and strictly surveilling employees because of their union activities; threatening employees with discharge if they engaged in union and protected concerted activities; enforcing rules more strictly or

³ Rather than repeat portions of my original decision, I hereby incorporate, by reference, into this supplemental decision the factual findings and related discussions from my decision of May 12, 2000.

⁴ The Respondent filed its state lawsuit on November 13, 1995, only two months after the issuance of the prior adverse decision by the Board and on the heels of additional unfair labor practices charges filed against it by the Union on November 2 and August 22, 1995.

creating new rules because of the union activities; interrogating employees about their union membership and activities; and instructing employees to stop their union and protected concerted activities. The Respondent, to put it bluntly, is not an employer that merely "didn't like" unions, but one that repeatedly demonstrated a willingness to vent its dislike through unlawful and unusually aggressive antiunion actions. In upholding the Board's decision, the United State Court of Appeals for the Seventh Circuit commented on the company's use of "heavy-handed tactics" to oppose the organizing campaign and to "intimidate and berate employees who supported" the Electrical Workers union.⁵ *Dilling Mechanical Contractors v. NLRB*, 107 F.3d 521, 523 (7th Cir. 1997), cert. denied, 522 U.S. 862 (1997). The record here leaves no real doubt that the Respondent's unsuccessful state court lawsuit was a continuation of its heavy handed, antiunion, tactics, and part of its "broader course of conduct aimed at harming the unions and interfering with employees' exercise of their rights under Section 7(a) of the NLRA." The Respondent's lawsuit amounted to a corruption of the judicial process, not genuine petitioning.

Conclusion

I have considered my original decision in light of the Supreme Court's decision in *BE & K* and am reaffirming my prior rulings, findings, conclusions, and recommended Order.⁶

Dated, Washington, D.C. February 28, 2003

Paul Bogas
Administrative Law Judge

⁵ The prior case involved the Electrical Workers union, as well as the Union involved in this case.

⁶ In my prior decision in this matter, I also found that the Respondent violated the Section 8(a)(1) of the NLRA by filing interrogatories and requests for production in the state court lawsuit that sought the identities of all its employees who had joined the Union. See *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999), enfd. 200 F.3d 1162 (2000). The Supreme Court's decision in *BE & K* did not discuss this issue in any way and does not warrant reexamination of my determination.